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No. 04-967

Supreme Court, U.S.
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In The Supreme Court of the United States

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,

Petitioner,

v.

BILL HILL, Dallas County District Attorney,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* JUSTINE M. KYKER IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE JUSTINE KYKER IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of the petitioner.[1] By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Justine Kyker ("Kyker") has a substantial interest in the disposition of this case. *Amicus Curiae* is a post-abortive woman physically and psychologically injured as a result of an abortion procedure.

SUMMARY OF THE ARGUMENT

Over the last thirty years, medical evidence and personal experiences have revealed that post-abortive women face a host of physical and psychological complications, risks, and by-products from the abortion procedure. Women endure emotional, spiritual, relational, psychological, and physical ramifications post abortion that were not fully contemplated nor explored by this Court in *Roe*. Kyker's own personal experience and the experience of the other post-abortive woman who submitted affidavits to the

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any other person other than *amici curiae*, their members, and their counsel.

District Court evidences the medically harmful consequences of this procedure. The thoughtful legal and analytical ideal in *Roe v. Wade*, 410 U.S. 113 (1973) of a protective blanket existing by virtue of a woman's carefully considered decision made in the informative sanctity of a physician-patient relationship has been merely an ideal.

ARGUMENT

Amicus Curiae, Justine Kyker ("Kyker"), respectively submits this brief in support of the Petitioner. Kyker submits that her personal experience with abortion supports Petitioner's contention that abortion harms women. The resulting harm to women from abortion was not generally known at the time the Court originally decided this case. This changed understanding of the actual results of abortion with respect to the women that have them warrants reconsideration of *Roe v. Wade*, 410 U.S. 113 (1973).

A. Kyker's Experience With Abortion And Its Aftermath.

For this Court to fully appreciate and understand Kyker's position herein, Kyker submits that it is essential for this Court to understand Kyker's personal experience and story underlying her prayer that this Court grant the Petition, to wit:

> My name is Justine M. Kyker, I am the thirty-five year old married mother of an eight-year-old girl and a five-year-old boy. My story is more painful than I can bear. On May 3, 1988, I went

to Planned Parenthood in Fort Dodge, Iowa, to obtain birth control pills. As a nineteen-year-old college student in a steady relationship, I trusted Planned Parenthood to protect my sexual health. On June 29, 1988, I went back to Planned Parenthood of Fort Dodge as my period was two weeks late. They performed a pregnancy test and said it was negative. They sent me home armed with additional protection of condoms and foam. By mid-August, 1988, I could no longer deny I was pregnant. I had not had a period for three months. I was home for the summer so I went to our family physician. He confirmed my fear. I was pregnant. My physician showed me pictures of couples wanting to adopt a newborn baby. I decided then I wanted to place my baby for adoption and told my family and friends of my plans.

During the Fall of my pregnancy, I moved to a large urban area away from my family. Under intense pressure from the father of my child and my closest friend, I decided to contact Planned Parenthood to obtain information on abortion. When I called their office, the receptionist asked me how far along I was in the pregnancy. When I said three months, she told me I needed to come in right away and scheduled an appointment for me the next morning. I was told to bring $200.00 cash.

At my initial session with a staff member, she said, "you seem sad." With that I started to cry. The staff member gave me a white pill and said "take this, it will make you feel better." I do not remember them calling my name or how I even got on the abortionist's table. The friend who took me to have the abortion said I was snoring while in the waiting room. The next thing I can remember was being jolted back to consciousness

when I heard and felt the abortionist's vacuum rip my baby from my body. I remember screaming loudly. Employees scrambled in from nowhere to get in my face and yell at me to "take deep breaths." I felt like every organ in my body was being ripped inside out from the suction. While the actual abortion took minutes, it was the beginning of flashbacks and physical reactions that continue to this day. The whole staff, including the Doctor, scrambled out of the door as soon as the abortion procedure was finished. There was a pool of blood underneath me. I was vomiting in the recovery room. The only support I received afterwards was from the other girls in the recovery room who just aborted their babies. No other support was offered and I never met, either before, during, or after the procedure, my abortionist.

Planned Parenthood did not tell me how far along I was. Based on my LMP of May 15 to the date of the abortion, September 1, 1988, I should have been sixteen weeks gestation. My baby was already formed with all organs in place. Planned Parenthood did not tell me this. I thought it was just a blob with a heartbeat. I felt immediate relief that my "problem" pregnancy was over. This relief soon turned to horror when soon after the abortion I was passing greyish clots that looked like dead flesh. Terrified that I may have been looking at a small hand or foot, I flushed the grey clots down the toilet. This was the beginning of the denial and severe depression that would plague me for years.

The impact of my abortion was devastating. I did not realize the full effects of this procedure on me physically, psychologically, emotionally, relationally, or spiritually until several years later.

My new boyfriend, who was not the child's Father, was disgusted that I had chosen abortion and said he didn't want to see me anymore. My relationship with my own father has been strained.

The physical problems started with the birth of my first child in 1996. I suffered an abruption of the placenta which caused excessive bleeding and required an emergency C-section.

With my next pregnancy in May, 1998, I had an ectopic pregnancy which caused me to lose this child. An ectopic pregnancy can occur when there has been previous scarring due to infection, or in my case, abortion. I had no idea I was at greater risk for ectopic pregnancies by having an abortion. I was not informed. As I was lying on the operating room table before the surgery to remove my ectopic pregnancy (the child was implanted in my fallopian tube), I had nightmarish flashbacks of the abortion. I kept thinking that my baby is alive, but when I wake up, my baby will be dead. Then the anesthesia started kicking in. The nurse told me as I was slipping out of consciousness "there is only one thing you need to do, breathe." This took the life of my child and I suffered the loss of a fallopian tube after a painful laparoscopy procedure.

In July, 1998, I was again pregnant, but lost this child to a miscarriage.

My second child was also born by C-section in 1999. My cervix never dilated past 1 cm in either pregnancy. Planned Parenthood never informed me that my future pregnancies may be affected by my abortion procedure. I simply had no idea.

> When I was twenty-nine, I had a benign tumor removed from my left breast. I now undergo routine mammograms due to my increased susceptibility to breast cancer as a result of my abortion. Again, no one ever told me this could happen.
>
> Psychologically, I have been devastated. I suffer from depression, which at times is severe and disabling, especially near the anniversary of the abortion and my baby's death. What was presented to me as a lump of tissue by Planned Parenthood was actually a child for whose death I am responsible. I just had no idea. No one said a word.
>
> Abortion and the psychological trauma is more than a medical phrase to me, it is the burden my soul must bear. I had a dream several years ago that shook me to my core and has remained with me always. I was driving a car on a road alone when a woman, a man, and a young girl suddenly appeared and started to cross the road in front of me. I couldn't stop. The man and woman got out of the way, but not the girl. She turned and looked into my eyes at impact. She was my aborted daughter.

This experience is not uncommon. Clearly, since *Roe*, there have been developments and recognition of abortion related trauma never contemplated by this Court at the time of *Roe*. The reality of abortion and abortion as it was considered at the time of *Roe* has been proven over the last thirty years to be drastically different. The woman's right to choose as supported by her treating physician within the confines of a healthy patient-physician relationship as contemplated in *Roe* is not the reality for most women. The proposition that abortion is a safe and healthy option for pregnant women has been proven incorrect.

B. The Court's Decision In *Roe* Was Based, In Substantial Part, On The Purported Existence Of A Physician-Patient Relationship And The Attendant Benefits Thereof.

In *Roe*, this Court found it relevant to consider the "history of abortion, for such insight as that history may afford us. . . ." *Roe*, 410 U.S. at 129. In this Court's historical review, the Court found that the physician's Hippocratic Oath "[r]epresents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day." *Id.* at 131. While further considering statutory precedent from both our own judicial history as well as that of English statutory law, the Court focused considerable energy upon the basis and position of the American Medical Association and the American Public Health Association.

The American Medical Association (hereinafter "AMA") policy received considerable attention from this Court recognizing the AMA shift in policy and position from June, 1967 to June, 1970. *Roe*, 410 U.S. at 142, 143. The adopted 1967 policy, as stated in *Roe*, was "[o]pposition to induced abortion, except when there is 'documented medical evidence' of a threat to the health or life of the mother, or that the child 'may be born with incapacitating physical deformity or mental deficiency,' or that a pregnancy 'resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient,' two other physicians 'chosen because of their recognized competence have examined the patient and have concurred in writing,' and the procedure 'is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.'" *Id.*

This Court noted in *Roe* the significant shift that occurred in 1970. The AMA's policy became focused upon best interests of the patient, sound clinical judgment, and informed patient consent. *Id.* at 143. This court further noted the resolutions or policy of the AMA was that the abortion was a "medical procedure" and should be performed by a licensed physician in an accredited hospital and after consulting two other physicians. *Id.*

This court further considered the opinion of the American Public Health Association (hereinafter "APHA") and specifically considered in *Roe* the position of the APHA and the Standards for Abortion Services as adopted by their Executive Board in October, 1970. *Id.* at 144, 145. Specifically, there were five APHA "standards" considered by this Court which are of particular interest and concern herein.

First of all, this Court noted one of the five APHA standards which stated that "'An important function of counselling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.'" *Id.* at 145. This Court further recognized an additional "standard" of the APHA that "'Psychiatric consultation should not be mandatory.'" *Id.* at 145. In addition, these services should be considered specialized and not offered on a routine basis. *Id.* The final APHA "standard" of particular interest stated "'A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.'" *Id.*

The afore-referenced considerations of this Court served as the very elements and foundation for this Court's holding in *Roe*. Interestingly, a common thread in

this Court's foundational consideration of the Hippocratic Oath, the AMA policies – both in 1967 and in 1970, and the APHA policy and standards of October, 1970, are the use of the terms "patient, physician, and medical procedure." Clearly, inherent in the consideration of the Hippocratic Oath is the recognition of a physician and patient relationship.

In the AMA's policies of both 1967 and 1970, again, inherent in this foundational consideration in *Roe* is a patient and physician relationship and consideration of an abortion as a medical procedure. Even the APHA policy recognized that "at present abortions should be performed by licensed physicians or osteopaths who are licensed to practice and who have 'adequate training.'" *Id.* at 146.

C. The Reality Of Abortion As Practiced Today Does Not Include A Physician-Patient Relationship.

In Kyker's case (which is not atypical if one considers the hundreds of affidavits submitted by Petitioner to the District Court), this physician-patient relationship as contemplated by the Hippocratic Oath, the AMA, and the APHA was never established. When Kyker presented at Planned Parenthood for consultation, neither before, during, nor after the procedure did Kyker meet the physician or abortionist. No consultation occurred with the treating physician to discuss the procedure, the alternatives to the procedure, to address patient questions or concerns, or for explanation or discussion of the risks of the procedure.

The Hippocratic Oath itself and both past and present AMA policies clearly contemplate that a patient-physician relationship be established and that the woman's decision

be made as a product of this relationship after careful consideration. This assumption was not the reality for Kyker. The thoughtful legal and analytical ideal in *Roe* of a protective blanket existing by virtue of a women's carefully considered decision made in the informative sanctity of a physician-patient relationship has been merely an ideal.

Reality, for Kyker and for others, has been an outpatient procedure in an environment that is not a traditional medical environment with consultation with a respected physician and a scheduled procedure for a subsequent date. The process instead has consisted of a one-stop process with no physician contact with the patient, limited disclosure, if any, of the physical, emotional, spiritual, and psychological ramifications of the procedure, and encouragement for an immediate response to the situation.

For Kyker, there was no meaningful therapy or counseling and absolutely no physician consultation prior to the procedure. Kyker met with non-physician staff, was medicated with what was believed to be a sedative by its effect upon Kyker, and pre-procedure counseling which entailed a five-minute meeting with a staff person who stated, "you look sad." For Kyker, the primary party to provide post-abortion counseling were the other "patients" at the facility.

Unfortunately for Kyker, the "wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors" as contemplated by the APHA in their October, 1970, Standards for Abortion Services were again an unrealistic and an unrealized ideal with the reality for Kyker being an outpatient procedure conducted at a "volume" facility

with no physician interaction and no "sympathetic volunteer" as contemplated by the APHA. *Id.* at 145.

In the context of considering whether a woman's decision whether or not to terminate her pregnancy was a protected right to privacy, this Court stated:

> This right to privacy, whether it can be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendments reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the state would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Roe, 410 U.S. at 153.

Once again, these findings envision pregnancy as a thoughtful consideration between patient and physician as "all of these are factors the woman and her responsible

physician necessarily will consider in consultation." *Id.* Reality has proven to be quite different. With Kyker, failure to provide any contact between the nineteen-year-old woman and her "physician" deprived her of this necessary consultation.

D. The Court's Decision In *Roe* Did Not Adequately Consider The Psychological Impact Of The Abortion Procedure On Women.

Although this Court's opinion in *Roe* considered the psychological impact of abortion, it was from the perspective of the impact on a woman seeking an abortion and abortion being unavailable. There was little, if any, consideration of the psychological implications *of actually having the abortion procedure.*

Kyker has been psychologically ravaged by her decision, which was not supported by the counseling and physician-patient relationship as *Roe* contemplates. Severe depression, in particular at the "anniversary date" of her procedure, has been a realized trauma for Kyker. Kyker's experience was the grief of child loss accompanied by the guilt of being the individual who made the uninformed decision. While post abortion counseling aided in cop .g and acceptance nearly ten years post procedure, the knowledge and consideration of the risks and by-products of the procedure were not made available nor disclosed by Planned Parenthood or its staff. Quite simply, this procedure was harmful to Kyker.

E. The Court's Decision In *Roe* Did Not Adequately Consider The Physiological Impact Of The Abortion Procedure On Women.

The consideration by this Court of "specific and direct harm medically diagnosable even early in pregnancy" also did not contemplate the actual physiological harm of the procedure itself on women. *Id.* at 153. It was not disclosed to Kyker that a documented risk for post abortive women is a greater risk of breast cancer than that of non-post abortive women. Kyker realized this risk when at age twenty-nine a benign tumor was removed from her left breast. This was another health risk to which Kyker was unknowingly subjected. Clearly, this constitutes "medical harm."

In addition, Kyker submits that her two children were born by virtue of a C-section procedure because of her cervix being damaged in the abortion procedure. Kyker's first child required an emergency C-section resulting from an abruption of the placenta. An additional pregnancy was an ectopic pregnancy as the fetus implanted in her fallopian tube. The condition was potentially life threatening and required a painful laparoscopy procedure. The result was the loss of the child and the removal of a fallopian tube. It was not disclosed to Kyker that an ectopic pregnancy can result from previous scarring caused by infection or abortion. Kyker was not informed that abortion placed her at greater risk for subsequent ectopic pregnancies. Clearly, this constitutes "medical harm."

F. Kyker's Experience, And The Experience Of The Post-Abortive Women Who Submitted Affidavits To The District Court, Demonstrates That The Court's Decision In *Roe* Was Based Upon An Incomplete Understanding Of The Ramifications Of The Abortion Procedure On Women.

The careful analytical consideration of *Roe* was premised upon facts, policies, and educated opinions as known and presented to this Court thirty years ago. The emotional, psychological, spiritual, relational, and physiological ramifications of this procedure were not fully known nor developed at the time of *Roe*.

As evidenced herein, significant emotional, psychological, relational, spiritual, and physiological ramifications were the by-products of Kyker's procedure. Kyker, consistent with the hundreds of other post-abortive women who submitted affidavits to the District Court in this case, has suffered from all of the above-mentioned trauma. The relevance is that with no disclosure of these risks and by-products of an abortion procedure coupled with Kyker having no patient-physician consultation, Kyker did not make an informed decision nor was she cognizant of the multiple ways in which abortion is harmful to women.

In *Roe*, this Court stated that "Modern techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe." *Roe*, 410 U.S. at 163. Kyker's own experience supports the conclusion that the assumption that abortion is now relatively safe was based upon incorrect and incomplete information available at the time this Court addressed *Roe*.

Upon review of *Roe*, no consideration of the above-mentioned health risks were contemplated and considered. The health information available at the time of *Roe* and as presented to this court when initially considering *Roe* appears vastly different than what we now know and have available today. Kyker's story is merely one example of how one woman was physically and psychologically ravaged by this procedure. The emotional, psychological, relational, physiological, and spiritual ramifications experienced by Kyker still remain.

From review of *Roe*, it appears that the extent of the risks and post-abortive ramifications were either unknown or not fully developed. The consideration of the Hippocratic Oath, the AMA policies, and the APHA standards and policies as contemplated in *Roe* did not encompass the health concerns and risks actually experienced by post-abortive women known today.

Over the course of the last thirty years, medical evidence and personal experiences have revealed that post-abortive women face a host of complications, risks, and by-products from an abortion procedure. As aforestated herein, the emotional, spiritual, relational, psychological, and physical ramifications were not fully contemplated nor explored by this Court in *Roe*. Kyker's own personal experience, and the experience of the other post-abortive women who submitted affidavits to the District Court, evidences the medically harmful consequences of this procedure.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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